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Nos. 07-1059, 07-1078

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

EURODIF S.A.,

Respondent.

USEC INC. and
UNITED STATES ENRICHMENT CORPORATION,

Petitioners,

v.

EURODIF S.A.; COMPAGNIE GENERALE DES MATIERES NUCLEAIRES; COGEMA, INC.; AD HOC UTILITIES GROUP; and UNITED STATES,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF THE COMMITTEE TO SUPPORT U.S. TRADE LAWS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The *Amici Curiae* in support of petitioners in this case are the Committee to Support U.S. Trade Laws ("CSUSTL") and the following companies and trade association members of CSUSTL: the American Iron and Steel Institute, the Coalition for Fair Lumber Imports Executive Committee, the Cold Finished Steel Bar Institute, the Copper & Brass Fabricators Council, Inc., Corey Steel Company, the Floral Trade Council, Florida Farmers, Inc., the Kansas Cattlemen's Association, the Lake Carriers Association, Lumi-Lite Candle Co., Inc., the Montana Cattlemen's Association, Nevada Live Stock Association, Nevada Committee for Full Statehood, Nucor Corporation, Steel Manufacturers Association, the Southern Shrimp Alliance, Specialty Steel Industry of North America, R-CALF USA, Republic Engineered Products, South Dakota Stockgrowers Association, the Timken Company, and the U.S. Business and Industry Council.[1]

In addition to the individual companies and trade associations identified, two other members of CSUSTL on whose behalf this brief is submitted are the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union ("USW") and the American Federation of Labor and Congress of Industrial

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

Organizations ("AFL-CIO"). The USW is the largest industrial union in North America with 850,000 active members manufacturing a broad range of goods, including tires, steel and pharmaceuticals.[2] The AFL-CIO is a voluntary federation of 56 national and international labor unions representing 10.5 million members. Both the USW and the AFL-CIO have been actively engaged in using the U.S. trade laws to ensure that American jobs and industries are not lost to unfair import competition.

Amici collectively are advocates and beneficiaries of the antidumping statute and span a wide array of domestic industries as well as workers. Many of the CSUSTL individual members have filed petitions and successfully secured protection against unfair trade. All of the *Amici Curiae* are concerned that the U.S. antidumping law be maintained as a strong and viable remedial tool to address injurious dumping of imports. As discussed further in the Argument, the interest of Amici Curiae in this case stems from the significant loophole in the antidumping law that would result from

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2. The USW was a petitioner in the antidumping investigation of uranium products imported from the former Soviet Union and represents over 1,000 highly-skilled workers employed at the United States Enrichment Corporation, the sole U.S. uranium producer. That investigation resulted in a suspension agreement that is now negatively affected by the appellate court's decision below. The USW is the successor-in-interest in that distinct matter. The original petition was brought by the Oil, Chemical and Atomic Workers International Union ("OCAW") in 1991. In 1999, the OCAW merged with the United Paperworkers International Union to form the Paper, Allied-Industrial, Chemical & Energy Workers International Union ("PACE"). In 2005, PACE merged with the United Steelworkers of America ("USWA") to become the USW.

the Federal Circuit's holding in *Eurodif S.A. v. United States*, 411 F.3d 1355 (Fed. Cir.) (Pet. App. 8a-28a), *aff'd on reh'g*, 423 F.3d 1275 (Fed. Cir. 2005) (Pet. App. 29a-35a), *final judgment*, 506 F.3d 1051 (Fed. Cir. 2007) (Pet. App. 1a-7a).[3] The breadth of the industries and companies that could be affected by the Federal Circuit's holding is expansive. Indeed, any domestic industry or company using the antidumping law could be affected.

CSUSTL and its individual supporting members are highly concerned that the effect of the appellate court's holding would essentially permit injurious dumping, contrary to the purpose of the law. Accordingly, CSUSTL and its individual supporting members have a strong interest in this matter.

SUMMARY OF ARGUMENT

Although recognizing the U.S. Department of Commerce ("Commerce" or "Commerce Department") as the "master of antidumping law," the Federal Circuit has failed to accord deference to Commerce's determination that the unfairly traded, imported goods at issue are subject to the antidumping law. The appellate court held that even though merchandise was manufactured in a foreign country and imported into the United States at a dumped price, causing injury to a competing U.S. industry, the antidumping law does not apply because the foreign producer is merely providing a "service" and not producing a "good."

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3. Citations are to the petitioners' appendix to the United States' petition for writ of *certiorari* in No. 07-1059 ("Pet. App.").

The Federal Circuit's decision ignores the common and statutory definitions of services that exclude activities whose output is a tangible good. The court's decision also elevates form over substance, focusing on the technical transfer of title rather than on the manufacturing operation that leads to the substantial transformation of raw materials into a different good for export. Most egregiously, the Federal Circuit ignores the purpose of the antidumping statute. The antidumping law's primary purpose is to provide a remedy to U.S. industries that are injured by dumped imports. Instead of deferring to a statutory interpretation by Commerce that would achieve that purpose, the appellate court's decision contravenes the purpose of the statute and provides a roadmap to foreign producers seeking to avoid the imposition of antidumping duties.

Unless overturned by this Court, the Federal Circuit's decision has created an expansive loophole to the U.S. antidumping law affecting domestic industries far beyond the uranium industry at issue here. A wide variety of products, including steel, lumber, textiles, brass, and semiconductors, can be sold at dumped prices into the United States and injure competing U.S. industries, but avoid the imposition of antidumping duties based simply on the terms of their contracts. Indeed, foreign manufacturers are now provided with a means to engage in dumping with impunity merely by restructuring their sales contracts. Given the critical importance of the U.S. antidumping law as the principal defense available to domestic manufacturers against unfairly traded imports, the court's holding has seriously undermined the viability of this remedy and has placed in jeopardy all industries that rely on this law to address unfair trading practices.

ARGUMENT

I. The Federal Circuit Erred In Failing To Give *Chevron* Deference To Commerce's Finding That The Antidumping Law Applies To The Imported Goods At Issue

In reviewing decisions of the Commerce Department, the Federal Circuit has long recognized that the laws that Commerce administers involve complex economic inquiries and that *Chevron* deference should be provided to Commerce's interpretations of the statute. *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996). Indeed, Commerce's special expertise makes it the "master of antidumping law." *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).[4] The Supreme Court in *Chevron* required the courts to accord deference to a reasonable interpretation of the statute by an administrative agency charged with its administration. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984). The Federal Circuit, in turn, has found that it is required to defer to permissible interpretations of the antidumping statute adopted by the Commerce Department, as the agency charged with its administration, in those instances in which the statute does not address the precise question at issue. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379-82 (Fed. Cir. 2001) (citing *Chevron*, 467 U.S. at 843).

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4. *See also F. Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("Commerce's special expertise makes it the 'master' of the antidumping law, entitling its decisions to great deference from the courts.") (citations omitted).

Despite this recognition, the Federal Circuit failed to give deference to the Commerce Department's reasonable interpretation of the antidumping law in this case, where the law does not address the precise question at issue. Indeed, not only is Commerce's interpretation of the statute permissible, it is also completely consistent with the purpose of the statute: to protect domestic industries from injury caused by unfairly traded goods. *Kemira Fibers Oy v. United States*, 61 F.3d 866, 874 (Fed. Cir. 1995). The Federal Circuit's determination, on the other hand, largely eviscerates the purpose of the law by elevating form over substance. As such, the Federal Circuit's decision should be reversed and Commerce's reasonable interpretation of the antidumping law sustained.

A. The Federal Circuit Erred in Concluding that the Foreign Producer Was Not Producing a Good but Was Merely Providing a Service

In the underlying antidumping investigation of low-enriched uranium ("LEU") from France, Commerce determined that the antidumping duty law should be applied to imported merchandise produced through contract manufacturing based on the substance of the transaction. *See Notice of Final Determination of Sales at Less Than Fair Value: Low Enriched Uranium From France*, 66 Fed. Reg. 65,877, 65,881 (Dep't Commerce Dec. 21, 2001) (hereinafter "*Final Determination*") (Pet. App. 239a). Commerce found that where the U.S. LEU purchaser supplied or arranged for the supply of raw materials to the foreign manufacturer, and those or other similar raw materials were substantially transformed through a manufacturing process into a different product that was then imported into the United States at an unfair

price, that activity comprised the production of a good not the provision of a service and, as such, was subject to the antidumping duty law. Pet. App. 238a-239a.

As Commerce explained, when a "purchaser has contracted out for a major production process that adds significant value to the input and that results in the substantial transformation of the input product into an entirely different manufactured product," that manufacturing process cannot be regarded as merely a "service" and outside the reach of the antidumping law. Pet. App. 240a. Indeed, the substance of this transaction is identical to the typical sales transaction in which a U.S. purchaser simply pays the foreign manufacturer to produce merchandise that is imported into the United States. Had that been the arrangement here, there would be no dispute that the transaction is subject to the antidumping law.

Given that the manufacturing activities performed in both instances are the same, the article produced in both cases is identical, and the injurious effect on competing U.S. producers is also the same irrespective of the structure of the arrangement, Commerce reasonably concluded that the transaction at issue involved the production of a good that was sold to a U.S. buyer and imported into the United States and, as such, was subject to the antidumping law. *Final Remand Determination, USEC Inc. and United States Enrichment Corp. v. United States* (Dep't Commerce June 23, 2003) (hereinafter "*Remand Determination*") (Pet. App. 131a, 134a). Indeed, as Commerce stated, it has "always considered the output from manufacturing operations that result in subject merchandise being

introduced into the commerce of the United States to be a good" and subject to the antidumping law. *Final Determination*, 66 Fed. Reg. at 65,881 (Pet. App. 240a).

Rather than sustaining Commerce's permissible interpretation of the statute, the Federal Circuit determined that *Chevron* deference was not warranted because "the antidumping statute unambiguously applies to the sale of goods and not services." *Eurodif*, 423 F.3d at 1278 (Pet. App. 33a). That conclusion focuses on the wrong issue. The question is not whether the antidumping statute applies to the sale of goods and not services. The question is whether the transaction here is fairly characterized as the sale of a good rather than the sale of a service. That question is not "unambiguously" resolved by the statute and, as such, *Chevron* deference should have been accorded to the agency's decision.

The antidumping statute does not define the terms "good" or "service," so deference under *Chevron* to the Commerce interpretations of those terms is warranted. 467 U.S. at 843. Commerce's distinction between goods and services is consistent with the common meanings of those terms. In common parlance, a sale of services generally refers to professional services, such as legal or medical services, or to activities such as maintenance, repair or other types of aid, while a sale of goods refers to a tangible good. The transaction at issue here involves the manufacturing of enriched uranium and the output is unquestionably a tangible good.

Commerce's determination is also consistent with the manner in which Congress has defined services

in other international trade legislation. In the International Trade and Investment Act, Congress defined services for purposes of authorizing the U.S. Trade Representative to coordinate and implement policies on the international trade in services. 19 U.S.C. § 2114b(5) (2000).[5] In that context, Congress defined "services" as "economic activities whose outputs are *other than tangible goods*." *Id.* (emphasis added). Examples of services identified in that statute are activities such as banking, insurance, transportation and professional services. *Id.* Commerce's finding that a good rather than a service was involved in this case is supported by this statutory definition of services as well.

The Federal Circuit's reliance on its earlier decision in *Florida Power & Light Co. v. United States*, 307 F.3d 1364 (Fed. Cir. 2002), to support its conclusion that the transaction at issue involved the provision of a service rather than the production of a good was in error. Pet. App. 20a-24a. The *Florida Power* case did not involve an interpretation of whether a sale of goods occurred under the antidumping law or any international trade statute but rather an interpretation of a contract under the Contract Disputes Act of 1978, 41 U.S.C. § 601 *et. seq.*, 307 F.3d at 1373. Even in that context, the court admitted that the transaction at issue did "not fall neatly" into either the category of a service or a good, but simply concluded that it was "best characterized" as one for a service for purposes of the Contract Disputes Act. *Id.* Based on this very different context, it was erroneous for the Federal Circuit to rely on the

5. Unless otherwise indicated, all references to the United States Code are to the 2000 edition.

Florida Power case to find that the transaction at issue here was clearly one for a service and, on that basis, to refuse to accord *Chevron* deference to the Commerce decision.[6] Pet. App. 33a.

B. The Federal Circuit Elevated Form Over Substance in Finding that a Sale of Merchandise Did Not Occur Under These Facts

The Federal Circuit also relied heavily on the statutory reference to a sale of merchandise as somehow placing the transaction at issue outside the reach of the antidumping law. In particular, the court cited the phrase "foreign merchandise is being, or is likely to be sold" in 19 U.S.C. § 1673(1), and concluded that this phrase does not encompass the transaction at issue in this case. 423 F.3d at 1278 (Pet. App. 33a). The antidumping law, however, does not define the terms "merchandise" or "sold." Again, in the absence of plain statutory language, *Chevron* deference is due to the Commerce Department in interpreting these terms in the antidumping law.

In this case, LEU was produced in France and exported to a purchaser in the United States. That the transaction was structured so that the U.S. buyer paid for the raw materials separately from the production of the LEU does not mean that a sale of foreign

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6. The Federal Circuit's decision in this respect is also inconsistent with the Supreme Court's recognition that deference to the agency's interpretation is appropriate for ambiguous statutes even when the court has previously construed the statute. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005).

merchandise did not occur, as the Federal Circuit found. Just as is the case where the foreign manufacturer first purchases the raw materials and manufactures them into a new product, the foreign manufacturer here produces and delivers to the customer a new, substantially-transformed good from raw materials the customer purchased separately. It would elevate form over substance to find that the antidumping laws apply to one form of this transaction but not the other, where the substance of both transactions is the same.

This Court recognized in *United Gas Improv. Co. v. Cont'l Oil Co.* that where a transaction was structured as a sale of leases instead of a sale of a product (natural gas), it "would exalt form over substance" and "give greater weight to the technicalities of contract draftsmanship" than to the purpose of the governing statute to fail to treat the transaction as a "sale." 381 U.S. 392, 400 (1965). Similarly, in *Gray v. Powell*, the Court rejected the claim that there had been no "sale or delivery or offer for sale" by the producers where the contract was structured as a sale of leases, stating: "the purpose of Congress, which was to establish the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code." 314 U.S. 402, 416 (1941).

The Supreme Court, therefore, has admonished against elevating form over substance where a contract was not technically structured as one for the sale of goods, as well as against focusing on the technical transfer of title, in defining a sale when interpreting the

reach of a statute. Instead, the Court's focus has been on the purpose Congress sought to achieve by the governing statute. Consistent with the antidumping statute and its purpose, the transaction at issue in this case falls squarely within the reach of the antidumping law. *See* section I.3, *infra*.

In reviewing the antidumping law, Congress has also made clear that the antidumping law covers transactions that, in substance, are tantamount to sales regardless of the structure of the transaction. When confronted with a situation in which transactions were structured as leases instead of sales, Congress clarified the reach of the antidumping statute to state that the law applied to such arrangements:

> The addition of language regarding leases is intended to clarify the applicability of both laws {the antidumping duty statute and the countervailing duty statute} to sham leases or leases which are tantamount to sales. Because of tax considerations or other business reasons, leasing arrangements are often utilized to accomplish what are in effect transfers of ownership. The Subcommittee intends that the coverage of both laws extend to such arrangements if the Department of Commerce finds them to be equivalent to sales.

H.R. Rep. No. 98-725, at 11 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5138. Commerce was instructed to consider, in determining whether a lease is equivalent to a sale for purposes of the antidumping duty law, "whether the lease transaction would permit avoidance

of" antidumping duties. 19 U.S.C. § 1677(19)(F). This legislative clarification demonstrates Congress' intent that arrangements structured as leases in form but equivalent to sales in substance are covered by the antidumping law. Given this broad legislative intent, it cannot be contended that contracts structured as sales of "services" that are equivalent to sales of goods would not be subject to the antidumping law.

Notably, under the facts presented here, it is not even the case that the raw materials owned by the purchaser were necessarily the same raw materials from which the finished product that was imported into the U.S. market was produced. *Remand Determination*, Pet. App. 226a-227a; *Final Determination*, Pet. App. 133a. The raw material input, uranium, is a fungible product. As such, the foreign producer manufactured the LEU from uranium generally, but not necessarily from the precise raw materials owned by the purchaser. *Id.* The LEU purchaser's claim that it owns material that was processed by the foreign producer and returned to it is not technically true but is, as the lower court recognized, a "legal fiction." *See USEC Inc. v. United States*, 281 F. Supp. 2d 1334, 1424 (Ct. Int'l Trade 2003) (Pet. App. 43a-44a) (citations omitted). Although CSUSTL believes that any contract manufacturing transaction should be considered a sale within the meaning of the antidumping law, it is particularly difficult to sustain the Federal Circuit's conclusion that no sale of goods was involved under these facts, where the actual raw materials owned by the purchaser were not necessarily used in the production of the finished, imported good.

Moreover, whether the finished product was made from the raw materials supplied by the purchaser is irrelevant; the foreign producer necessarily acquired an ownership interest in the LEU when it substantially transformed the raw materials, regardless of their source, into a new and different product. That ownership interest was then transferred to the buyer when the U.S. purchaser took delivery of the LEU, a substantially-transformed product.

As the *Gray v. Powell* court recognized, the transfer of title should not be the determinative factor in defining a sale where such a result defeats the purpose Congress sought to achieve. 314 U.S. at 416. The foreign manufacturer is engaging in the same production operations and producing the same product. Indeed, under these contract manufacturing arrangements, the difference is often merely which party carries the financing costs of the raw materials. This arrangement does not transform the activity of the foreign manufacturer into that of providing a service rather than producing a good, does not alter the fact that a sale of imported merchandise at a dumped price occurred, and should not permit the parties to avoid the reach of the antidumping law.

C. The Federal Circuit's Holding Is Inconsistent With The Antidumping Statute, Its Legislative History And Its Remedial Purpose

Not only is Commerce's decision reasonable given the language of the statute, it is also fully consistent with the purpose of the antidumping law. The primary purpose of the antidumping law is to protect domestic industries from unfairly traded imports. *Kemira Fibers*, 61 F.3d at 874; S. Rep. No. 96-249 at 37, 39, 87 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 423, 473.[7] The Federal Circuit has recognized that the antidumping statute is a "remedial" law intended to offset the effects of unfairly traded imports so as to prevent harm to competing U.S. producers. *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990). The law does not operate to preclude subject imports from entering the U.S. market but rather imposes remedial duties to neutralize the unfair trading practice. *Nucor Corp. v. United States*, 414 F.3d 1331, 1336-37 (Fed. Cir. 2005).

The antidumping statute is fully consistent with and, indeed, a necessary component of, an equitable global system of trade. For many years, high tariffs were imposed to protect industries from competition with imported products. As succeeding rounds of

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7. *See also Koyo Seiko Co. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value.") (citing *Smith-Corona Group v. United States*, 713 F.2d 1568, 1575-76 (Fed. Cir. 1983)); *Hynix Semiconductor, Inc. v. United States*, 424 F.3d 1363, 1368 (Fed. Cir. 2005).

international agreements under the auspices of the General Agreements on Tariffs and Trade ("GATT") took place, tariffs were reduced or eliminated, and antidumping laws increased in importance as an important means to prevent injury to domestic industries from unfairly traded imports. Indeed, some analysts have recognized that the maintenance of strong antidumping laws to protect domestic industries from injurious, unfairly priced imports "may be necessary in order to maintain political support for an open international trading system." Congressional Budget Office, *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy*, at 23 (Sept. 1994) {hereinafter "CBO Report"}(citation omitted).

This Court has held that remedial statutes are to be broadly interpreted consistent with their purpose. *Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557, 571 (1987) (citing *Urie v. Thompson*, 337 U.S. 163, 180 (1949)). A broad interpretation of the antidumping law is appropriate because "{t}he purpose of the {antidumping law} is to prevent dumping, an activity defined in terms of the marketplace." *Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). The effect on the marketplace, rather than the terms of a contract, therefore, is the appropriate context in which to consider whether the imports at issue are subject to the antidumping duty law.

Given that the primary purpose of the antidumping law is to provide remedial relief to domestic industries injured by unfairly traded imports, the statute should not be interpreted in such a way as to make it more difficult for domestic industries to obtain such relief. The

holding of the Federal Circuit, unfortunately, does precisely that. The appellate court's holding, in fact, provides a major loophole to foreign producers seeking to evade the reach of the U.S. antidumping law.

It is noteworthy that when Congress has had an opportunity to amend the antidumping duty law, it has generally done so to strengthen it and expand its reach. The first major amendment to the antidumping law under the Trade Act of 1974 "significantly expanded the coverage of U.S. antidumping law." CBO Report at 25 (citing 19 U.S.C. § 2101, 88 Stat. 1978). Similarly, the three subsequent, major amendments to the trade laws – the Trade Agreements Act of 1979, the Trade and Tariff Act of 1984, and the Omnibus Trade and Competitiveness Act of 1988 – all "had provisions that continued the Congress' long push for stronger AD/CVD protection for U.S. firms." *Id.* at 27 (citations omitted).

Congress has amended the antidumping law, in particular, to address actions by foreign producers and importers that seek to circumvent an antidumping order. In 1979, Congress enacted a statutory provision designed "'to deter exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by {Commerce}'" *ICC Indus., Inc. v. United States*, 812 F.2d 694, 700 (Fed. Cir. 1987) (quoting H.R. Rep. No. 96-317 at 63 (1979)). In 1988, Congress further amended this provision to develop "an improved critical circumstances procedure {that} will significantly strengthen antidumping and countervailing duty

procedures. . . ." H.R. Rep. No. 100-576 at 611 (1988) (conference report). In 1994, Congress amended the anti-circumvention provisions in the statute, stating that it "expects and intends that the new standard will be less difficult to meet, thereby improving our ability to prevent circumvention {of the antidumping law}." S. Rep. No. 103-412 at 82 (1994). In 2006, Congress amended the antidumping law to prevent foreign producers from exploiting a loophole in the "new shipper" provision that was undercutting the intended remedial effect of the law. Pension Protection Act, Pub. L. No. 109-280, § 1632(a), 120 Stat. 780, 1165; *see also* CRS Report for Congress, "Trade Remedies: 'New Shipper' Reviews," Order Code RS22290 at 3-4 (Dec. 18, 2006).

In sum, Congress has repeatedly revised the antidumping law to strengthen that law and to ensure that the Commerce Department is able to address a wide array of activities that would circumvent its terms and defeat its purpose of protecting U.S. industries from harm caused by dumped imports. In light of this legislative intent and the purpose of the antidumping law, Commerce properly concluded in this case that parties should not be able to avoid the reach of the law merely by structuring their transactions in a particular manner. As Commerce stated:

> the unfair trade laws must be applicable to merchandise produced through contract manufacturing, just as they are applicable to merchandise manufactured by a single entity. To do otherwise would contravene the intent of Congress by undermining the effectiveness

> of the {antidumping duty} laws, which are designed to address practices of unfair trade in goods, as well as have profound implications for the international trading systems as a whole. To the extent that contract manufacturing can be used to convert trade in goods into trade in so-called "manufacturing services," the fundamental distinctions between goods and services would be eliminated, thereby exposing industries to injury by unfair trade practices without the remedy of the {trade} laws.

Final Determination, 66 Fed. Reg. at 65,881 (Pet. App. 239a).

The Federal Circuit's holding that the transaction at issue is not subject to the U.S. antidumping law, by contrast, contravenes the purpose of the statute and permits dumped imports to injure a U.S. industry without legal recourse. The appellate court's decision is inconsistent with the legislative intent of Congress to protect domestic industries from unfairly traded imports and fails to recognize the broad reading of the statute that is appropriate given its remedial purpose.

II. The Federal Circuit's Decision Creates An Expansive Loophole To The U.S. Antidumping Law

The effects of the appellate court's holding are not limited to the uranium industry but have sweeping implications for all domestic industries that rely upon the U.S. trade laws as a remedy against unfairly traded imports. The Federal Circuit's decision in *Eurodif* has created a major loophole to the antidumping law and provided a roadmap to its circumvention that extends well beyond uranium. Foreign producers are now on notice that they may avoid the imposition of antidumping duties simply by structuring their contracts with U.S. purchasers in the manner used by the French uranium producer.

The broad holding by the Federal Circuit means that where dumped merchandise is imported into the United States and causes injury to a U.S. industry, no remedial action is possible under the antidumping statute if the parties set up a contract manufacturing arrangement. Under such an arrangement, a purchaser may acquire raw materials and deliver those materials to the foreign producer to be substantially transformed into a completely different article of commerce. Alternatively, a foreign producer may produce and deliver the finished product to the customer under the contract processing arrangement even before the customer has supplied the raw material and without using the actual raw materials purchased by the U.S. buyer. Pet. App. 133a, 226a-227a. Nonetheless, by structuring their sales in these contractual terms, foreign producers can insulate themselves from the reach of the antidumping law.

Various products, including steel and other metal products, chemicals, and textiles, often are sold under contract manufacturing arrangements. A U.S. brass purchaser, for example, in lieu of purchasing brass sheet and strip, could restructure the contract with the foreign producer so that the purchaser acquires and takes title to the raw material, copper, initially, and then transfers the copper to the foreign producer to be manufactured into brass sheet and strip. Similarly, purchasers of imported pasta could supply wheat to be transformed into pasta, purchasers of semiconductors could supply sand to be processed into semiconductors, and purchasers of bedroom furniture could supply wood to be manufactured into furniture. So long as the contracts are structured to have the purchaser retain title to the input, the overseas manufacturing operation – no matter how significant that operation and no matter that it substantially transformed the raw materials into another product that is then exported to the United States – would be considered by the Federal Circuit as a "service" and the resultant imported merchandise would escape the reach of the antidumping law.

It should not be the case that merely by structuring the terms of the transaction in a particular manner foreign producers can escape the payment of antidumping duties that would otherwise be owed. Congress could not have intended that the very parties that are the targets of the antidumping law could so easily evade that law simply by restructuring their sales terms. Such a result essentially vests in the parties seeking to avoid the reach of the antidumping law the ability to opt out of the law's application through their contractual terms. The Federal Circuit's decision,

permitting foreign sellers to avoid the application of a remedy intended to protect U.S. industries based simply on the structure of their contracts, reflects an absurd interpretation of this remedial statute.

Nor should it be the case that domestic industries that are injured by reason of these dumped imports have no recourse under the law where contract manufacturing arrangements exist. The opportunity for mischief and evasion of the antidumping law under the Federal Circuit's holding is extensive. Based on the court's roadmap for avoiding the antidumping law, the protection that had been afforded in the antidumping law to U.S. producers and workers injured by unfairly traded imports is in serious jeopardy.

The trade remedy laws, including in particular the antidumping laws, are the only defense available to U.S. manufacturers against unfairly traded imports. The loophole to the antidumping law created by the Federal Circuit's decision dramatically undermines the viability of this remedial tool to domestic industries injured by dumped imports.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Federal Circuit should be reversed and the Commerce Department's determination upheld.

Respectfully submitted,

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